

**R & S Transport, Inc. and Roger E. Cramer. Case
8-CA-12706**

March 26, 1981

DECISION AND ORDER

On November 26, 1980, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions¹ and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me in Zanesville, Ohio, on May 19-23, 1980. The complaint herein, as amended, alleges the discriminatory refusal to hire 16 individuals in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, herein called the Act, and unlawful threats and interrogation in violation of Section 8(a)(1) of the Act. The Respondent denies the commission of unfair labor practices.

Upon the entire record,¹ together with my careful observations of the demeanor of the witnesses as they testified, and with due consideration of the briefs submitted by the General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. THE 10(B) ISSUE

The charge upon which the complaint and amendments thereto is based was filed and served on Respond-

¹ "McElpesh" is properly named "McElfresh" in the complaint and Charles Shaw is erroneously named "William" Shaw.

ent on March 22, 1979. It alleges the discriminatory refusal to hire Roger Cramer, William McElfresh, Sr., Thomas Taylor, Teddy Walls, Cleatus West, Charles Perry, Charles Shaw, "and others." The complaint issued on April 27, 1979, naming these seven employees² plus Earl Wiegand. On September 5, 1979, a new charge was filed by Robert Eppley alleging 13 additional discriminatees, and was dismissed by the Regional Director as untimely filed. The Regional Director, by amendment to complaint dated November 5, 1979, added Elmer Mitchell and Ralph Stotts as employees refused hire since January 1979. The Regional Director issued a second amendment to complaint on March 3, 1980, adding Duane Bolyard, Charles Grimes, Eugene Murphy,³ Carl Fulmer, Donald Skinner, and Robert Eppley to the list of those allegedly refused employment for unlawful reasons. All but Murphy, a mechanic, were drivers.

At the hearing, the Respondent moved to dismiss the complaint allegations as they relate to Bolyard, Grimes, Murphy, Fulmer, Skinner, Eppley, Stotts, and Mitchell. The Respondent's position, basically, is that there is no timely filed charge to support these allegations, and the March 22, 1979, charge is not broad enough to support the amendments to the complaint. The General Counsel opposed Respondent's motion and I denied it. Both now argue the point in their post-trial briefs.

An almost identical sequence of timely filed charges alleging specific discriminatees "and others," charges filed and subsequently dismissed by the Regional Director as time barred, and the inclusion in the amended complaint of the discriminatees alleged in the time-barred charges occurred in *Southern Florida Hotel & Motel Association*.⁴ The respondent's contention there that those individuals named in the untimely charges could be granted no relief was rejected by the Administrative Law Judge, and this ruling was adopted by the Board. As in *Southern Florida Hotel*, the original charge in the case before me is broad enough to support the Regional Director's amendments to the complaint; the original charge was timely filed, and the Regional Director properly proceeded "just as though the time barred charges had never been filed." Accordingly, I adhere to my ruling at the hearing denying the Respondent's motion to dismiss.

II. JURISDICTION

The Respondent, a Michigan corporation, is engaged in the interstate transportation of cement at its East Ful-tonham, Ohio, facility. Annually, in the course and conduct of its business operations, the Respondent receives in excess of \$50,000 from the interstate transportation of goods. The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

² See fn. 1, above.

³ It appears Murphy's name is Murphy G. Murphy, but he goes by Gene Murphy.

⁴ 245 NLRB 561 (1979).

III. LABOR ORGANIZATION

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 637, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES⁵

The Respondent was incorporated in the late fall of 1978 by the principals of Michigan Transportation Co. for the purpose of performing cement hauling for Columbia Cement Company which had previously been performed for many years by Hennes Trucking Company. Hennes ceased operating in the fall of 1978. Hennes had a collective-bargaining agreement with Teamsters Local 637 which required all its employees to be union members. Michigan Transportation, like Hennes, has had similar agreements with the Teamsters from the 1940's to the present and it is clear that the Respondent herein intended from the outset to negotiate a contract with the Teamsters and notified Columbia Cement on October 26, 1978, of its intention to have a union contract at the facility involved herein. After meetings with the Union commencing in the winter of 1978, R & S in May 1979 signed the Union's newly negotiated statewide contract and became a party thereto.

After an initial effort to staff its operation with employees other than those who had been working for Hennes,⁶ the Respondent found it was unable to procure enough drivers without resorting to the former crew of Hennes. For this reason, and at the urging of Columbia Cement's traffic and credit manager, Darrell Miller, the Respondent commenced the interviewing and hiring of Hennes' employees in November 1978.

Of the Hennes' drivers available, 56 were hired, 29 were not.⁷ Of the 29 not hired, 15 are herein alleged as discriminatees along with mechanic Eugene Murphy. At the time of hearing, Respondent had 74 drivers of whom 56 were former Hennes drivers.

At one of his meetings with the Respondent, apparently in late October, Darrell Miller urged that when R & S began hiring Hennes drivers there were a few "bad apples" that should be sorted out because they had caused delivery problems while driving for Hennes. Miller did not name the "bad apples" he was referring to, but suggested to the Respondent's president, Ralph Posnik, that he discuss the Hennes drivers with Michael Cooper, a Columbia Cement supervisor who had previously been office manager for Hennes for 1-1/2 years until October 1977, because Cooper knew the Hennes

employees. Miller told Cooper that the Respondent would be talking to him, and requested Cooper to provide R & S with his evaluation of the good and bad points of the Hennes employees. Miller was not personally acquainted with the Hennes personnel or their union or concerted activities, did not know of any union problems at Hennes, and did not tell the Respondent there were any union problems at Hennes. Miller also recommended two drivers who were subsequently hired.

The Respondent's president, Posnik, and its executive vice president, Cline, interviewed a few of the Hennes drivers, but most of the job applicants were interviewed by Richard Maes. Maes, who was the general manager at another location for Michigan Transportation, was sent by Cline to the facility herein involved in the first week of November 1978 to set the operation up, including the hiring of the necessary employees. Maes remained at this location until he was replaced by Richard Godfrey on December 17, 1978. Only four drivers, none of them Hennes employees, had been hired before Godfrey came.

Shortly after he arrived, Maes met with Michael Cooper with whom he then discussed the Hennes employees. Cooper gave Maes his opinion of each as an employee, and Maes made notes on a Hennes seniority list. Cooper impressed me as a credible witness who was testifying candidly and in considerable believable detail. I credit his testimony regarding his comments to Maes about Hennes drivers. He was not asked for nor did he volunteer any information about mechanic Eugene Murphy. Although Cooper's sketches of the Hennes drivers were based on hearsay as well as personal knowledge, I find that he gave his honest opinion of their suitability for hire, and that his adverse evaluations were not motivated by the fact that the affected applicants may have filed grievances or engaged in other protected activity, and he did not discuss any such activities with Maes.

Cooper told Maes that he would not hire Stotts, Mitchell, Walls, or Cramer and assessed the job suitability of Perry, McElfresh, Shaw, West, Skinner, Eppey, Bolyard, Grimes, and Wiegand in uncomplimentary terms. His description of the performance of each was, in substance, as follows:

Ralph Stotts: Troublesome employee who cannot control his temper, had been discharged for fighting, had made threats to the dispatcher, was undependable, made late deliveries, had threatened his supervisor, had torn a timeclock off the wall⁸ and been discharged, and had been barred from delivering to certain customers at their request. Cooper also informed Maes that Stotts had formerly been a union steward.

Elmer Mitchell: Undependable, late delivery, excluded from customers' premises for being nude thereon, and also excluded from premises for bleeding air lines on customers' concrete.

⁵ The facts set forth herein are based on a synthesis of the credited aspects of the testimony of all witnesses, the exhibits, stipulations, and careful consideration of the logical consistency and inherent probability of the facts found. Although I may not, in the course of this decision, discuss every bit of record testimony or documentary evidence, it has been carefully weighed and considered. To the extent that evidence not mentioned herein might appear to contradict my fact findings, that evidence has not been disregarded but has been rejected as incredible, lacking in probative worth, surplusage, or irrelevant.

⁶ The initial decision not to hire Hennes' employees is not alleged as an unfair labor practice.

⁷ The Hennes seniority list for August 1978 shows a total of 92 drivers, but 6 were extra drivers and 1 retired.

⁸ It does not appear that Stotts tore a timeclock down, but he did other damage to the premises on the occasion in question.

Charles Perry: Rolled a truck over and did not remember it afterwards slow, late, undependable, and a possible heart problem.

William McElfresh: Hard on equipment and rather slow.

Charles Shaw: Good driver, but a loudmouth who was insubordinate and a troublemaker who was always complaining about his dispatch.

Cleatus West: A constant complainer who did not want to work on Saturdays and who always raised a fuss as to why he was not called in, even though he did not want to work. Cooper characterized him as a "snake in the grass" and a "royal pain in the ass." Cooper also told Maes that Cleatus West's brother was the union president.

Donald Skinner: Big time waster.

Robert Eppley: Rough on equipment.

Duane Bolyard: Undependable, had been discharged for putting the wrong cement in a bin.

Charles Grimes: Constant complainer and troublemaker who was always wanting to incite others into something to complain about, and was tough on equipment.

Earl Wiegand: Commonly had to ask several people for directions before starting his trip.

Teddy Walls: Slow, undependable, had been fired for falsifying timesheets.

Roger Cramer: Trouble, a hypochondriac who was always late, a pouter and slow and crotchety.

Many of Cooper's adverse statements about the applicants are supported by other evidence in the record, and I find no basis on which to conclude that his criticisms were of malicious manufacture as the General Counsel suggests. He gave Fulmer a favorable recommendation, and it does not appear that he ventured any opinion on the remaining alleged discriminatees.

Cooper was an employee of Columbia Cement when he gave Maes his evaluations, and I am not persuaded that he was acting as anything more than a special agent of the Respondent, at the most, when he talked to Maes. If Cooper based any of his appraisals on the extent of union or other protected activities of those appraised, it is not apparent in the record. He was not asked by Maes to report, nor did he report, any such activities to Maes.⁹ Without such knowledge, Maes could hardly have relied on it in making his hiring decisions. Moreover, assuming *arguendo* Cooper had unlawful motives behind his unfavorable comments, Cooper's uncommunicated motives may not be imputed to the Respondent for whom he was at most acting as a special agent.¹⁰

I credit Maes that he not only received this information from Cooper but also received information about the

drivers from Barbara Rucker,¹¹ the Respondent's office clerical, who had previously worked for Hennes for 3 years, and from other Hennes drivers who were applying, as well as ex-Hennes Supervisor Hanson who had supervised the Hennes mechanics. As a result of all these conversations Maes made the following notations on the Hennes seniority list with respect to the alleged discriminatees named below:

Stotts	Trouble
Mitchell	Stripper
Walls	Slow
Cramer	Sickly
Perry	Slow
McElfresh	No coop [cooperation]
West	Union affiliated
Skinner	Trouble
Eppley	Danger
Grimes	Troublemaker
Weigand	Dumb

From the foregoing advice and his notes, Maes distilled a list of 18 employees who were not to be hired. Among them were Skinner, Stotts, Fulmer, Grimes, Shaw, Walls, Taylor, Cramer, Eppley, Mitchell, Wiegand, West, and McElfresh, all of whom are alleged herein as discriminatees. The remaining five not to be hired were Fred Dunn, Keith Livensperger, Roland Wiseman, Harry White, and Dave Retzer. Roland Wiseman was in fact later hired. There is no allegation that Dunn, Livensperger, White, or Retzer were discriminatorily refused employment.

The Respondent's mechanics were hired by Cline. He credibly testified that he did not hire Eugene Murphy because Russell Hansen, former working foreman for Hennes, advised him some time in February 1979 that Murphy did not try to get along with supervisory people and tried to pick the easiest work for himself to do. There is no evidence that Cline was aware of any union or protected activities of Murphy at the time he decided not to hire him.

During his tenure at East Fultonham, Maes received applications from employees and interviewed employees. It is alleged that Maes, in the course of this activity, threatened and coerced employees in violation of Section 8(a)(1). Teddy Walls testified that when he picked up his job application on or about November 13, 1978, Maes told him and others,¹² in the presence of Cooper, that the Respondent was not going to hire a few of the Hennes drivers because they were troublemakers and had union activity. According to Walls, he returned some 2 or 3 weeks later with Tom Taylor who was filing his application, and Taylor and Charles Crippen went into Maes' office. Walls was outside the office more than

⁹ Cooper's only comments in this regard were that Stotts had been a union steward, West was the brother of the Union's president, Robert Rambo had been a union steward at Hennes, and Donald Lincicome was a former union steward. Both Rambo and Lincicome were hired by the Respondent.

¹⁰ *F & D Enterprises, Inc., d/b/a Westward Ho Hotel*, 251 NLRB 1199 (1980).

¹¹ Rucker impressed me as a credible witness carefully trying to relate only that which she told Maes. Her comments on employees substantially paralleled those of Cooper.

¹² No other applicant testified to this allegation. Maes denies speaking to any employee about union activity, but concedes he probably did say to the applicants that he wanted no "troublemakers" and explained to them that he wanted no one who argues with customers, fellow drivers, or the dispatcher. Cooper denies hearing Maes make any statements about not hiring those engaged in union activities.

15 feet away from Maes. Walls claims he heard Maes say to Taylor and Crippen that there were "a few troublemakers and union activity fellows" who would not be hired.

With respect to the second incident, neither Crippen nor Taylor, both of whom were present with Walls, recalls Maes making reference to union activities.

I am persuaded that, although Maes may well have said on one or both of these occasions that he would not hire troublemakers, he did not refer to union activism or equate a union activist with a troublemaker. I do not credit Walls' otherwise uncorroborated allegations. His testimony on the subject appeared strained and artificial when I heard it; there is credible testimony contradicting him; and I agree with the Respondent that it is not likely that Walls would have neglected to note in his pre-trial affidavit that Maes made such statements if he indeed had. I therefore find the allegations based on Walls' testimony must be dismissed because the evidence thereon does not preponderate in the General Counsel's favor.

Earl Wiegand asserts that he, and about 20 others including alleged discriminatees Shaw, McElfresh, Murphy, Skinner, and Cramer, and maybe West went to get job applications from Maes on November 13, 1978. Wiegand testified that Maes said he was going to hire those who had not been involved in filing grievances or picketing "or any such things as that." On cross-examination Wiegand testified that Maes also said that the Respondent was not going to be union and did not want anyone who was going to be involved with the Union or wanted to go union. Wiegand then again expanded his version to include a reference by Maes to anyone who had filed grievances "or was involved with picketing with Shaw and the other men." Wiegand then affirmed that Maes *did* mention Shaw's name, then stated Maes *did not* mention Shaw's name "at that time," and, finally, that Maes *never* mentioned Shaw's name as involved in picketing. The internal inconsistencies in his testimony are obvious. Considering these inconsistencies which struck me as a transparent effort to bolster his testimony and further considering that none of the other alleged discriminatees allegedly present gave testimony in support of Wiegand's version; I credit Maes' denial that he made any such statements.

The charge in the instant case was filed and served on March 22, 1979. It was received by the Respondent on March 26, 1979. Wiegand testified that he went to the Respondent's office in mid-March 1979 to inquire about his application, whereupon General Manager Godfrey showed him the "no hire" list, and his name was on it. Godfrey promised to check further with a view to possible reconsideration of Wiegand. According to Wiegand, he returned a week later to check and was asked by Godfrey if he had anything to do with the group of men going to court over not being hired. Godfrey allegedly advised him that if he did there was no use for Godfrey to check further because Wiegand would not be hired anyway. Wiegand's pre-trial affidavit given to the Board is dated March 30, 1979, and places the latter conversation with Godfrey during the week before the week within which he gave his affidavit. It would therefore seem that Wiegand was referring to the week of March

18 through 24, but he equivocated when asked about this and avoided committing himself to any particular week.

Godfrey denies having such a conversation with Wiegand, and credibly testified that he was not at the Respondent's facility on March 20, 21, 22, or 23, and did not return there until March 26. Wiegand could not have talked to Godfrey between March 19 and 26. There is no showing Godfrey could have known of the charge prior to its receipt by the Respondent on March 26, and Wiegand could not have had the conversation with Godfrey he describes during the week previous to that in which he gave his affidavit. It is possible that Wiegand did in fact have the talk with Godfrey between March 26 and 30, but this does not comport with his affidavit claim. The matter is not entirely free from doubt but, given the timing problem, Wiegand's equivocation when questioned closely about it, and Wiegand's lack of credibility with respect to his conversation with Maes, I am persuaded that the denial of Godfrey, who struck me as a straightforward and honest witness superior in demeanor to Wiegand, is entitled to greater weight than the allegations of Wiegand. Godfrey's denial is therefore credited. I also credit Barbara Rucker that, during the last conversation she heard between Wiegand and Godfrey, Wiegand called Godfrey a liar when Godfrey told him the Respondent had not told him why Wiegand would not be hired,¹³ and Godfrey asked him to leave.

That the Respondent had a list of employees it was not going to hire soon became common knowledge among the Hennes drivers. Maes told some he had such a list, and Hanson told several Hennes employees the same thing. How Hanson knew this is not in the record. McElfresh was told the same by the Respondent's dispatcher, Tuttleston, some time after McElfresh filed his application. I have some doubt that Perry and Bolyard were told by Hanson their names were on the not-to-be hired list because in fact they were not, but their testimony in this respect is uncontroverted. Hanson was still a Hennes employee when he made his comments, and clearly no more than a special agent of the Respondent for the purpose of advising of employees' qualifications until he became the Respondent's employee and supervisor in February or March 1979.

I do not credit Skinner that Hanson told him in August 1978 that no one who had engaged in picture taking of nonunion trucks hauling from Columbia Cement on four or five Mondays in the summer of 1978 would be hired, because the Respondent had no contact with Columbia Cement or Hennes until the fall of 1978 and could not have had any such plan in August. Hanson may have told Skinner that in December, as Skinner claims,¹⁴ but, as I have noted, Hanson's statement, if it were made, does not bind the Respondent. Moreover, the Respondent in fact hired 15 of the 24 employees, including union steward Rambo, identified in the record as being involved in the summer incident.¹⁵ Alleged discri-

¹³ The evidence shows that Godfrey hired employees whose applications had been approved by Maes.

¹⁴ I have considerable doubt as to Skinner's credibility on this topic, but Hanson did not testify.

¹⁵ Shaw estimates there were about 32 involved.

minatees Walls, Shaw, Eppley, McElfresh, Grimes, Taylor, and Skinner were involved in this endeavor in varying degrees. Fred Dunn and Abbott were also present, were not hired, and are not alleged as discriminatees. Shaw, Merle Dunn, and Abbott were the most regular in attendance on these Mondays, while the rest came and went.¹⁶

In addition to the picture taking and/or monitoring in the summer of 1978, the General Counsel advances other union activities, primarily grievance filing or processing, at Hennes to show that the alleged discriminatees had engaged in protected activities. The record also shows, however, that a number of those Hennes employees who were hired by the Respondent had filed grievances.

The difficulty with the General Counsel's case is that although the evidence shows at least some minimal union or concerted activity or grievance filing by most of the alleged discriminatees, except for Skinner and Wiegand who filed no grievances and took no part in the summer 1978 episode, there is no credible evidence that the Respondent knew of any of these protected activities, or that Respondent treated applicants differently because they may have engaged in such activities. Additionally, Perry and Bolyard¹⁷ never filed applications with the Respondent, and neither they nor Murphy appear on the "don't hire" list prepared by Maes. Murphy was not hired for the simple reason that Hanson described his job performance to Boyd Cline in uncomplimentary terms.¹⁸ Murphy made some oral complaints to his steward but filed no written grievances, and was not involved in the summer 1978 monitoring of Columbia Cement trucks.

The record shows no general hostility toward the Union or animus toward the protected activities of anyone of the alleged discriminatees, or Respondent the knowledge of such activities, nor have the Respondent's reasons for not hiring the alleged discriminatees been shown to be pretextual.¹⁹ To the contrary, I am persuaded that the Respondent exercised reasonable business judgment in selecting and rejecting applicants on the basis of the information it received on their relative suitability for employment.

This case is a pastiche of bits and pieces, some of which have not been covered above. Most are irrelevant, but two matters may require some brief discussion. The first is Maes' statement to Cleatus West, in December 1978, to the effect that West's brother, the Union's presi-

dent, had said West should have been fired 10 years before. West concedes that he had heard of this comment by his brother several years ago. I do not see that this repetition by Maes does anything to prove the allegation that Cleatus West was discriminatorily refused hire. The second matter relates to Maes' notations on the Hennes seniority list. He noted "steward" after the name of Rambo who was hired. Rambo was the union steward and I draw no adverse inference from the notation. The note that Cleatus West was "union affiliated" refers to the information received by Maes that West was the union president's brother²⁰ and does not, in my opinion, give rise to any reasonable contention that the notation shows West was denied a job because of his brother's position. Similarly, the fact that Cooper mentioned to Maes that Stotts had been a union steward was not a factor in refusing to hire him. Maes concluded that Stotts was "trouble" from the information he received about his temper and tendency to physical violence. In this connection, Stott's argumentative and belligerent demeanor on the witness stand convinces me that Maes' evaluation from the information he received was not inaccurate.

Upon the entire record, I find that the General Counsel has not sustained his burden of proof on the complaint allegations by a preponderance of the credible evidence, and I shall recommend that the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of the Act.
3. The General Counsel has not established by a preponderance of the evidence that the Respondent has violated the Act as alleged in the complaint.

Upon the basis of the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²¹

The complaint is dismissed in its entirety.

¹⁶ The General Counsel's contention that Roger Cramer was involved is refuted by Cramer's denial of such involvement.

¹⁷ I credit Cooper that Bolyard did not give him an application.

¹⁸ There is no evidence Hanson told Cline of any protected activities Murphy may have engaged in.

¹⁹ With respect to Taylor the Respondent advanced no reason for not hiring him, but the General Counsel has not shown that he was refused hire for unlawful reasons.

²⁰ All of the Hennes employees were known to be union members and it makes no sense to construe this note as a recognition of West's membership.

²¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.